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No. 95-1853

IN THE

Supreme Court of the United States

October Term, 1996

WILLIAM JEFFERSON CLINTON

Petitioner,

v.

PAULA CORBIN JONES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE COALITION OF AMERICAN VETERANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Coalition of American Veterans, ("Amicus") respectfully submits this brief as amicus curiae in support of the the Respondent. Pursuant to Supreme Court Rule 37(a), the parties have consented to the filing of this

brief and the written consent has been filed with the Clerk of this Honorable Court.

INTEREST OF AMICUS CURIAE

The Coalition of American Veterans (CAV) is a corporation which represents over 100,000 United States Armed Forces veterans, both active-duty and retired, nationwide. The CAV is opposed to extending special privileges afforded by an Act of Congress to a specified class of people, such as the Soldiers' and Sailors' Civil Relief Act, to individuals not included in that class.

SUMMARY OF ARGUMENT

There is no legal basis for the relief the Petitioner seeks. First, the Petitioner no longer claims that he is entitled to a stay of litigation under the Soldiers' and Sailors' Civil Relief Act of 1940 (the "Act") because he is on active duty military status, but now seeks that same relief by analogy. Such relief remains an extraordinary remedy, despite Petitioner's protestation to the contrary. The argument by analogy instead of by specific intent still seeks an unwarranted extension of a protection afforded by Congress, and which Congress only can extend, to someone Congress did not intend to protect. The power to analogize laws is the power to create laws. Second, no court has ever held that the President is entitled to official immunity for unofficial acts. To grant the relief Petitioner seeks would be

to violate the Respondent's civil rights and place the Petitioner above the law.

ARGUMENT

I. THE RELIEF SOUGHT REMAINS AN EXTRA-ORDINARY REMEDY AND AN UNWARRANTED EXTENSION OF A PROTECTION AFFORDED BY CONGRESS TO SOMEONE IT DID NOT INTEND TO PROTECT

In his brief, the Petitioner no longer claims that he is on active duty military status and, hence, entitled to relief under the Soldiers' and Sailors' Civil Relief Act of 1940. Instead, the Petitioner now contends that the relief he seeks is "analogous" to relief granted under the Act[1]. Yet, despite the fact that he no longer has a statute upon which he seeks to rely, the Petitioner asserts, "But these examples dispel any suggestion that the President ... is somehow seeking extra-ordinary relief ... ." (Pet. Brief, p. 37). Such is not the case. Thus, the Petitioner takes the position that he is entitled, by analogy, to the relief before the court which he now admits

[1] In his Brief, the Petitioner states that the Soldiers' and Sailors' Civil Relief Act "provides yet another analogous example of a stay, though the President does not claim, and has not claimed, relief under the Act." At footnote 32, he states, "President Clinton does not claim to be on active military status. Nor does he claim protection under this or any other legislation ..."

that Congress did not grant him. The logic underlying the Petitioner's analogy is flawed. Further, the analogy itself does not bear scrutiny.

While Petitioner would have the courts create a rule of law by analogy, ostensibly because of the importance of his office to the country, he fails to acknowledge that to do so would be the creation of law by a manner which the Constitution does not allow. In our constitutional republic laws are enacted by the Congress, not by analogy. Continuing the tradition of the common law, rules are enunciated by judges to interpret and advance the law, but laws, including interpretative rules pronounced by the judiciary necessary to the proper application of those laws, are not created by analogy. Intendment, either in a proscription of the legislative branch or as necessary to the carrying out of such intendment, must be found. There is no such intendment here and none is even argued. It is conceded, in fact, that with regard to the Act in question, it does not apply, yet still a result is sought as if it did apply.

Petitioner seeks to advance his analogy argument by listing five laws and judicial rules, including the Act. Four of these constitute a "smoke screen" intended to disguise the weakness of his analogy argument now that he has admitted the inapplicability of the Act. It is clear that analogizing from the Act alone does not have convincing force because it is to argue that Congress gave leave to expand the Act beyond what was intended by its clear language. The argument does not gain strength by bringing in four more

Petitioner's Brief, p. 36.

examples that are a disparate congeries and which certainly were not embraced in any way in the Congressional intent expressed in the Act.

Each of the other four examples cited by the Petitioner (the Bankruptcy Code, the practice of taking criminal matters first while civil matters involving the same parties are pending, the doctrine of exhaustion of administrative remedies, and the doctrine by which claims of qualified immunity are allowed to be appealed on an interlocutory basis) are either direct proscriptions of Congress, as is the case with the Act at issue and the Bankruptcy Code, are the result of necessarily carrying out such a proscription (as when Congress proscribes an administrative agency and procedure which must be followed before relief can be sought in the courts) or they are necessary to determine the extent of such a proscription as with the threshold determination of whether a qualified immunity obtains for an act committed in an official capacity, or finally, as with the priority to given to criminal over civil matters, they have been deemed necessary for the orderly administration of courts since the early days of common law. None of these things approximate the President's present situation.

What Petitioner seeks is not an extension of what Congress intended by analogizing from what Congress stated in a law or even in a set of similar laws, nor is it an extension by analogizing of what the courts have stated. It is an extension of what neither the Congress nor the courts

have stated. It is a principle enunciated out of, and impelled by, a claim of administrative inconvenience and which only then has been analogized to a list of disparate enactments and rules which have no common thread nor authorship but which have been searched out in an effort to justify the otherwise unsupportable argument.

What Petitioner is doing is asking this Court to create, rather than interpret, the law. He seeks to create by "analogy" that which he could have sought from the legislature. The Petitioner is the President of the United States of America. If he felt that he, as President, should have been entitled to a stay under the Act or other relief by special legislative act, he could have asked the Congress to pass such a law. This lawsuit was filed on May 6, 1994. Congress has been in session several times since then. The President has had ample opportunity to ask Congress to act, but, for whatever reason, has failed to do so. To suggest that courts create such a law by "analogy" is to usurp the authority of Congress. The power to analogize law is the power to create law.

What the Petitioner really seeks here is an unwarranted extension of a protection afforded by Congress in the Act to someone Congress did not intend to protect. In the face of public outcry and for the sake of political expedience[2], the President dropped his original claim that he was on active duty status and, therefore, exempt. Yet

[2] See "An Open Letter to the President of the United States from Medal of Honor Recipients," Chicago Tribune, May 27, 1996, and the news

now he seeks by "analogy" that same relief. Petitioner may be arguing by analogy, but the end result he seeks is the same: an unwarranted extension of a protection afforded by Congress to someone it did not intend to protect.

The use of analogy is not appropriate where Congress has expressed its intent specifically and, as the Petitioner has now conceded, the fact pattern at issue is not embraced within that intent. On the topic of analogy it is well stated, and it applies here, that "In working out the legal rights and liabilities arising from novel legal relationships, courts wisely strive to assimilate such to other long established and defined relationships to which the one in question is most similar. But analogy does not mean identity. It implies difference. Also the attendant use of established terminology only adds to the danger of carrying an analogy too far." (emphasis added). *Sturm v Ulrich* (8th Circuit 1925) 10 F2d 9, 11. Congress, in enacting a law such as the Act, considers what could be covered and defines what is covered in the final version of the bill. That which is different from that which is covered, even though it may be analogous in certain respects, is, by the intent of Congress, not covered. To argue, as petitioner does, that though he is not covered by the law, and not entitled to come within its scope, he is, nonetheless, entitled to its benefits by analogy, is not only to misconstrue the constitutional scheme for originating laws, it is to ask that that scheme be bypassed, and that laws originate with the executive branch, provided

paper article, "Honored Vets Flay Clinton in Ad," Washington Times, May 26, 1996.

that it can persuade the judicial branch that it would be inconvenient not to analogize them into being.

That Congress did not intend to protect someone in the Petitioner's position with the Act is readily apparent in the case of *Boone v. Lightner*, 319 U.S. 561 (1943). In that case, Boone, a Captain, sought a stay of proceedings against him in a North Carolina civil action on the grounds that he was in the military, stationed in Washington, D.C. In holding that the petitioner was not entitled to a stay simply because he was in the military, the Court undertook an exhaustive review of the legislative history of the Act. In footnote 2, Congress discusses who is to be protected:

> "Major John H. Wigmore, one of the drafters of the bill, stated at the Senate hearings, that 'a universal stay against soldiers is wasteful, because hundreds of them are men of affairs and men of assets, and they have agents back here looking after their affairs. There is no earthly reason why the court proceedings should stay against them. It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take care of themselves, and the court would say to them, "no; your affair is a going concern; go ahead with the lawsuit. You have a lawyer ... .'"
>
> "The House Report on this bill, No. 181, 65th Cong., 1st Sess., stated: 'Instead of a rigid suspension of all actions against a soldier, a restriction upon suits is placed only where a court is satisfied that the absence of the

> defendant in military service has materially impaired his ability to meet that particular obligation. Most of the actions sought to be brought against solders will be for small amounts and will thus be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or not the defendant who seeks the benefit of the statute has really been prejudiced by his military service. Though not in military service, he may have property from which the income continues to come in irrespective of his presence; perhaps he may be some ne'er-do-well who only seeks to hide under the brown of his khaki ...' (p.2.)."
> *Id.* at 566-567.

In the present case it is clear that, even if he were in the active duty military, the Petitioner is not someone Congress intended to protect. If, as the Petitioner suggests, this Court were to grant a stay "analogous" to relief under the Soldiers' and Sailors' Civil Relief Act, a number of perplexing issues arise. Would this Court feel bound to impose "analogous" restrictions found in the Act? Despite the fact that the District Court also stayed the proceedings against co-defendant Ferguson, under Section 524 of the Act, the Respondent may be able to proceed against Ferguson. *Trujillo v. Wilson*, 189 P2d 147 (Colorado, 1948). Under section 521 of the Act, the trial court would have to make a determination as to whether the Petitioner's ability to conduct his defense was materially affected by his military service. *Jamaica Savings Bank v. Bryan*, 25 NYS 2d 17 (New York, 1941). Further, could it be that, under

section 573 of the Act, the President would defer paying his income taxes? Such a thing should not be. Clearly, the relief the Petitioner seeks here is an extraordinary remedy and one not intended by Congress.

Finally, the issue of whether the President, as Commander-in-Chief of the military is entitled to a stay of civil litigation against him under the Soldiers' and Sailors' Civil Relief Act has already been raised in court. In 1962, President Kennedy sought a stay from the California Superior Court in two lawsuits which were filed against him prior to his taking office. In footnote 10, Judge Bowman points out, "the Court denied Mr. Kennedy's motion for a stay, apparently without a written opinion, and the case eventually settled." *Bailey v. Kennedy*, No. 757, 200 (Cal. Super. Ct.. 1962); *Hills v. Kennedy*, No 757, 201 (Cal. Super. Ct. 1962)." (CCA p. 15, reported at 72 F.3d 1354). Just as the California Court found the President's argument to be without merit, we would urge this Court to do the same.

II. GRANTING THE RELIEF SOUGHT WOULD PLACE THE PETITIONER "ABOVE THE LAW."

No one is above the law. It is a basic principle of our system of justice that every citizen be afforded access to the courts. "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Courts, however, have recognized in certain situations that public officials, because of the nature of their duties, have immunity for their official acts. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Petitioner, however, asserts that he should be entitled to immunity for his unofficial acts. There is absolutely no legal precedent for the Petitioner's position, and to grant the relief the Petitioner seeks would violate the Respondent's civil rights and place the Petitioner above the law.

There can be no doubt that the President is subject to the legal process. We start with the proposition that "our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal laws ..." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Furthermore, the President can be sued in a civil lawsuit. *United States v. Nixon*, 418 U.S. 683 (1974), (where the Court ordered the President to release official presidential communications despite the claim of executive privilege), *National Treasury Employees Union v. Nixon*, 492 F2d 587, 615 (D.C. Circuit 1974) (where the court held that the President was subject to judicial process in a civil case). The question, then, is whether there is any law to keep the Petitioner, in his unique position, from being sued.

There is absolutely no legal precedent for the Petitioner's contention that he is entitled to official immunity for unofficial acts. As the American Civil Liberties Union pointed out to the 8th Circuit Court of

Appeals in its Amicus Curiae brief in support of Appellee Jones, "(u)p to this time, no court has ever held that any person is immune from suit for damages for actions taken outside official governmental responsibilities, even temporarily." *Jones v. Clinton*, Nos. 95-1050, 95-1167 (Amicus Brief, p. 17). According to Judge Bowman, both sides agree that the case of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) is controlling. (CCA Opinion at p. 8. reported in 72 F.3d 1354). In Fitzgerald, this Court held that the farthest immunity extends is "to acts within the 'outer perimeter' of {the President's} official responsibility." Id. at 756. Further, as Chief Justice Burger points out in his concurrence, the President's immunity "does not extend beyond such actions." and "a President {is} not immune for acts outside official duties." Id. at 761 n.4, 759. Again, the Petitioner asks this Court to place him above the law. His request should be denied.

The delay the Petitioner seeks would also jeopardize the Respondent's case and place him above the law. The Petitioner downplays the potential effect of a delay, but justice delayed is justice denied. Witnesses die. Evidence is lost. Memories fade. In his concurrence, Judge Beam recognizes this fact:

> "Should the death or incompetence of a key witness occur, proving the elements of Ms. Jones's alleged causes of action will become impossible. Thus, her "chose in action" would be obliterated, or at least substantially damaged if she is denied reasonable and timely access to the workings of the federal tribunal." CCA opinion, p. 19, reported at 72 F.3d 1354

Again, Petitioner has cited no legal precedent for placing himself above the legal rights of the Respondent and, hence, above the law.

The Petitioner's assertions also raise another perplexing issue. Let's assume for a moment that the Petitioner had been charged with a crime arising from the alleged encounter. If Petitioner had been charged with indecent exposure or solicitation as a result of the incident complained of, this Court would have no legal precedent for staying any criminal action or impeachment proceedings. Yet according to the logic the Petitioner proposes, if such criminal charges were filed, the state would be able to go forward on behalf of the victim but the victim herself would have no such right in a civil court. In fact, should this civil action be allowed to go forward, depending upon the evidence adduced at trial, it is not beyond the realm of possibility that criminal charges - and even resulting impeachment proceedings - could be instituted against President Clinton.

CONCLUSION

There is no legal basis for this Court to grant the relief Petitioner seeks. What the Petitioner seeks by "analogy" is an unwarranted extension of a protection afforded by Congress under the Soldiers' and Sailors' Civil Relief Act to someone Congress did not intend to protect.

The power to analogize laws is the power to create laws. Moreover, because the power to analogize laws would then be the power to enact laws that would be different than the laws intended by the legislative branch, the person analogizing the law would then be invested with the authority to make laws which the legislature had not intended, and possibly had rejected or did not want. He would then be above the legislature, and, therefore, above the law. This would be antithetical to everything which our Constitution stands for. No argument of expediency justifies such a result. To grant such relief would violate the Respondent's civil rights and place the Petitioner above the law.

This 9th day of September, 1996.

Respectfully submitted,

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